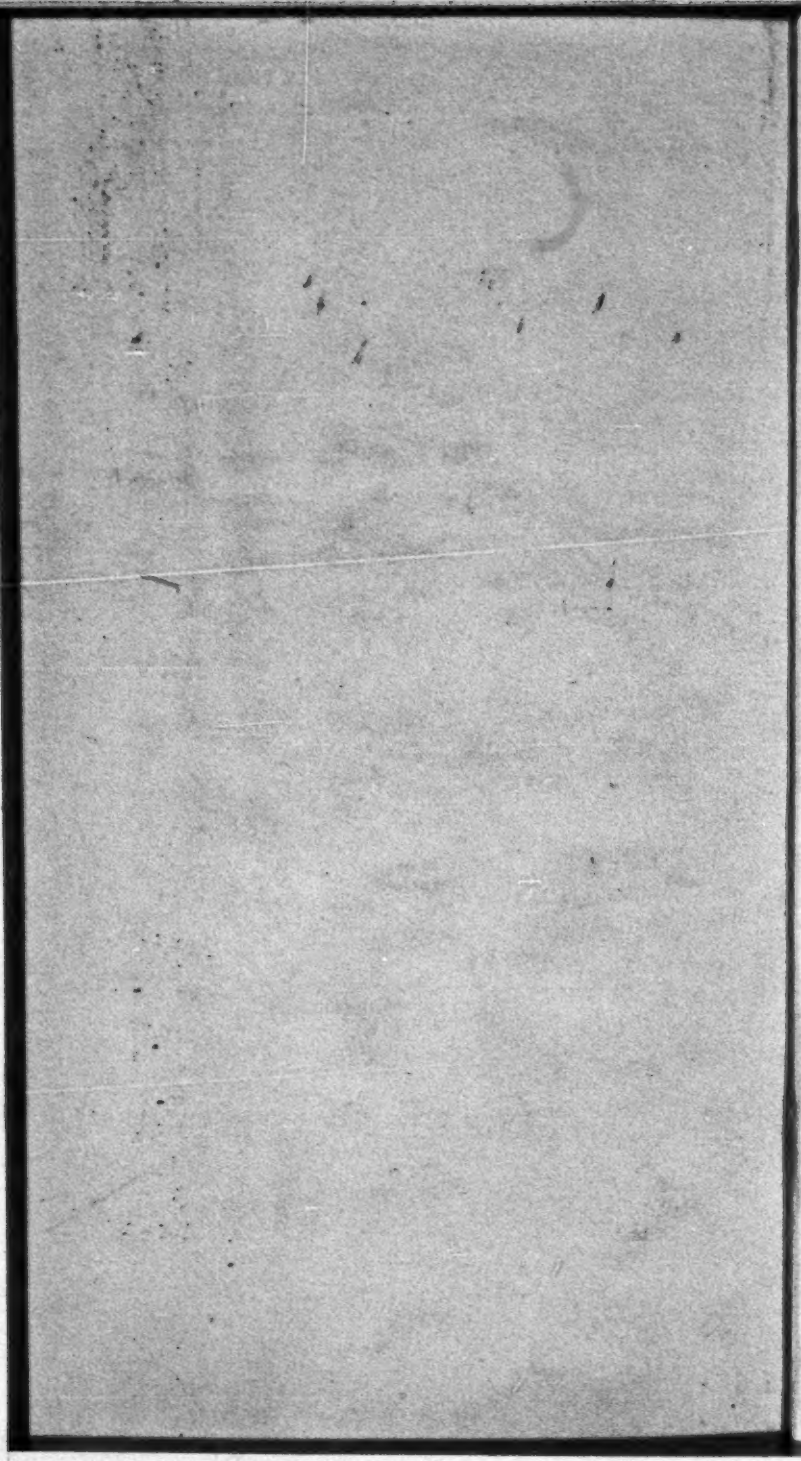

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IN THE

# Supreme Court of the United States

**October Term, 1972**

**No. 72-888**

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

*Petitioners,*

v.

INTERNATIONAL PAPER COMPANY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF PETITIONERS-APPELLANTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF PETITIONERS-APPELLANTS

### Opinion Below

The United States Court of Appeals for the Second Circuit is reported as *Zahn v. International Paper Company*, 469 F. 2d 1033 (2d. Circuit 1972), affirming the opinion of the United States District Court for the District of Vermont, that opinion being reported at 53 F. R. D. 430 (D. Vt. 1971).

## Jurisdiction

The judgment of the Court of Appeals for the Second Circuit became final October 18, 1972. A Petition for a Writ of Certiorari was filed December 16, 1972, and was granted February 20, 1973. The jurisdiction of this court rests on 28 U. S. C. 1254 (1).

## Statutes and Rules Involved

The statutes and rules involved in this matter are as follows:

28 U. S. C. A. 1332. *Diversity of citizenship; amount in controversy; costs.*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different states;

(2) citizens of a State, and foreign states or citizens of subjects thereof; and

(3) citizens of different States in which foreign states or citizens or subjects thereof are additional parties.

(b) Omitted—is not relevant

(c) Omitted—is not relevant

(d) Omitted—is not relevant

Fed. R. Civ. P. 18—*Joinder of Claims and Remedies.*

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal equitable, or maritime, as he has against an opposing party.

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action, but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money. As amended Feb. 28, 1966, eff. July 1, 1966.

Fed. R. Civ. P. 20—*Permissive Joinder of Parties.*

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Omitted—is not relevant.

Fed. R. Civ. P. 23—*Class Actions.*

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the

class (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include the describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
As amended Feb. 28, 1966, eff. July 1, 1966.

F. R. C. P. 24—*Intervention.*

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

## Question Presented for Review

The question presented for review in this matter is whether a diversity action brought under 28 U. S. C. A. 1332 (a) will be allowed to proceed as a class action under Fed. R. Civ. P. 23 (b)(3) when the named plaintiffs meet the jurisdictional amount requirement of 28 U. S. C. A. 1332 (a) but some other unnamed plaintiffs of the class do not.

## Statement of the Case

This appeal seeks to review the September 7, 1972, affirmation by the United States Court of Appeals for the Second Circuit of a Decision of the United States District Court of the District of Vermont, dated September 30, 1971, wherein the District Court denied permission for this case to proceed as a class action under Fed. R. Civ. P. 23 (b)(3).

This is a diversity action seeking compensation and punitive damages for harm to the plaintiff's lakefront properties caused by the defendant International Paper Company's alleged pollution of Lake Champlain. The action was filed in the United States District Court for the District of Vermont on February 9, 1971, by the named plaintiffs on behalf of themselves individually and on behalf of all other plaintiffs similarly situated. The basis for jurisdiction in the first instance was 28 U. S. C. A. 1332 (a). The District Court dismissed this case for lack of jurisdiction as to all members of the class except the named plaintiffs, and then permitted an interlocutory appeal under 28 U. S. C. A. 1292 (b).

The Complaint alleged that discharges into Ticonderoga Bay in southern Lake Champlain from defendant's pulp and paper manufacturing plant in Ticonderoga, New York, had caused the formation of a "sludge blanket or bed" of woodchips, cinders, and other decaying organic waste material, had adversely affected the water quality of the lake, and had resulted in deposits of portions of the sludge on Vermont lakefront properties across from the plant. The named plaintiffs sued on behalf of a class of some 200 lakefront landowners and lessees in a three-town geographic area, claiming that the value of their properties has been diminished as a result of discharges from the plant, and seeking compensatory and punitive damages. The Complaint alleges that the named plaintiffs have each suffered damages in excess of $10,000.00, but makes no allegations as to the damages of the unnamed members of the purported class.

This is essentially the same set of facts which produced a suit of which this Court took original jurisdiction during the October Term, 1970, *State of Vermont v. State of New York and International Paper Company.* That case is presently being tried before a master.

The District Court held "with great reluctance" (Petition for Writ of Certiorari, Appendix, p. 46) that this suit could not be maintained as a class action under Fed. R. Civ. P. 23 (b)(3), reading *Snyder v. Harris*, 394 U. S. 332 (1969), to require that:

> "each class member in a spurious class action must independently satisfy the requirement as to jurisdictional amount." (Petition for Writ of Certiorari, Appendix, p. 44).

Judge Leddy found that in this case:

> "it is unlikely that the property of every lakefront landowner in the towns of Orwell, Shoreham, and Bridport is valued at $10,000.00, and, to a legal certainty, it is not credible that every such owner has suffered pollution damage in excess of $10,000." (Petition for Writ of Certiorari, Appendix, p. 42).

He observed that:

> "the requirement that each class member meet the jurisdictional amount clearly undermines the usefulness of Rule 23 (b)(3) class suits, because the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable." (Petition for Writ of Certiorari, Appendix, p. 46).

Nevertheless, Judge Leddy felt compelled to order that the action not be permitted to proceed as a class action.

The United States Court of Appeals for the Second Circuit, by a 2 to 1 vote, affirmed on September 7, 1972. In dissent, Judge Timbers argued that ancillary jurisdiction should operate to allow class treatment of this suit. He wrote:

> "The majority's reliance on *Snyder v. Harris* . . . strikes me as being unsupportable. In *Snyder* no member of the class had a claim that could satisfy the amount in controversy requirement; so that the Court never reached the ancillary jurisdiction issue." (Petition for Writ of Certiorari, Appendix, p. 27).

Unlike *Snyder*, Judge Timbers argued, this case is properly within federal jurisdiction with regard to the named plaintiffs, and ancillary jurisdiction should extend to the unnamed plaintiffs.

The majority opinion did not directly treat the question whether ancillary jurisdiction exists as to the unnamed plaintiffs in this case. Accordingly, on September 18, 1972, plaintiffs filed a petition for a rehearing containing a suggestion that the appeal be reheard *en banc*. Of the eight active Second Circuit judges, one disqualified himself. Of the seven remaining judges, four voted in favor of *en banc* reconsideration, and three opposed reconsideration. The petition was nevertheless denied, because Fed. R. App. P. 35 (a) authorizes a rehearing *en banc* only when ordered by a "majority of the circuit judges who are in regular active service", apparently requiring a 5-2 vote in order for this appeal to be reconsidered. Judge Timbers, joined by Judge Oakes, dissented from this application of the rule.

A Petition for a Writ of Certiorari was filed with the United States Supreme Court on December 16, 1972. The Petition for Certiorari was granted on February 20, 1973.

## Summary of Argument.

Application of the doctrine of ancillary jurisdiction to a Rule 23 (b)(3) class action where the named parties meet the requisite jurisdictional amount but some unnamed members of the class do not is consistent with the doctrine of *Snyder v. Harris*. It is also consistent with the cases supporting *Snyder v. Harris* and the policy considerations of prompting judicial economy. The lower court erred in extending *Snyder v. Harris* to this case. No independent jurisdictional amount should be required of the unnamed class members who are more analogous to intervenors as of right than to parties permissively joined. Application of the doctrine of ancillary jurisdiction will promote proper utilization of Rule 23 (b)(3) class actions as protective devices.

## ARGUMENT

**The lower court erred when it extended the holding of *Snyder v. Harris*, 394 U. S. 332 (1969), to deny federal court jurisdiction in a class action where the named plaintiffs met the jurisdictional amount but some of the unnamed plaintiffs did not.**

### POINT I

**Application of the doctrine of ancillary jurisdiction to establish federal jurisdiction of the unnamed members of a class in a Rule 23 (b)(3) class action when the named members have established jurisdiction in a federal court is consistent with the purposes of *Snyder v. Harris*.**

The dissenting opinion below by Judge Timbers focused on the error in the majority opinion stating:

> "(I)t ignores the well established principle that if the case is properly in a federal court, that court has subject matter jurisdiction over the case or controversy in its entirety and, therefore, can adjudicate related claims of ancillary parties who have no independent jurisdictional grounds." (Petition for Writ of Certiorari, Appendix, p. 22).

It is the Rule of this court that once federal jurisdiction has been properly invoked by the named parties to a suit, related claims of additional parties may also be brought before the federal court even though the additional parties lack diversity of citizenship. *Stewart v. Dunham*, 115 U. S. 61 (1885); *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356 (1921). If lack of diversity between the unnamed members of a class and a defendant will not destroy federal jurisdiction, the same principle should apply where the unnamed plaintiffs do not possess the jurisdictional amount. The analogy is complete and the principle should be extended and expanded accordingly.

In fact, as Judge Timbers indicated, the doctrine of ancillary jurisdiction has been expanded by this court from its original use only in situations where it was "necessary to the effective operation of the federal courts", to a concept which "has been used primarily to promote judicial economy through the avoidance of piecemeal litigation". Dissenting Opinion of Judge Timbers, citing *Moore v. New York Cotton Exchange*, 270 U. S. 593 (1926). (Petition for Writ of Certiorari, Appendix, p. 22). In recognition of this expansion, the recent trend in the decisions of the lower federal courts has been to invoke ancillary jurisdiction in cases where the requisite jurisdictional amount was lacking. *General Research, Inc. v. American Employers' Inc. Co.*, 289 F. Supp. 735 (W. D. Mich. 1968); *Lucas v. Seagrave Corp.*, 277 F. Supp. 388 (D. Minn. 1967); *Johns-Manville Sales Corp. v. Chicago Title & Trust Co.*, 261 F. Supp. 905 (N. D. Ill. 1966); *Lesch v. Chicago & Eastern Illinois Railroad Co.*, 279 F. Supp. 908 (N. D. Ill. 1968); *Shipley et al. v. Pittsburg and L. E. R. Company*, 70 F. Supp. 870 (W. D. Pa. 1947). These cases support the proposition that utilization of ancillary jurisdiction would "promote judicial economy through an avoidance of piecemeal litigation".

Unquestionably the application of the doctrine of ancillary jurisdiction in this case will promote judicial economy. While the damages of some members of the proposed class may not meet the requisite jurisdictional amount, it is possible and indeed probable that there are many who do possess claims in excess of ten thousand dollars. The named plaintiffs are the owners of substantial amounts of lake frontage on the shores of Lake Champlain, and their actions will proceed to trial and judgment whether this case is treated as a class action or not. If class action

treatment is denied, the unnamed members with claims in excess of ten thousand dollars will be in a position to adopt a wait-and-see attitude. Judgments in favor of the four named plaintiffs in their individual suits would then result in a rush to the door of the federal courthouse by each of the separate claimants to file his individual claim. Denial of class action status in this case would, therefore, result in a multiplicity of suits being brought in the federal courts, thereby defeating the concept that judicial economy should be encouraged through the avoidance of piecemeal litigation. Application of the ancillary jurisdiction doctrine to this case would promote a single lawsuit and would, therefore, be entirely consistent with this court's position in *Snyder v. Harris, supra,* that a procedure should not be adopted which would ". . . add to the burdens of an already overloaded federal court system". 394 U. S. at 341.

## POINT II

**_Snyder v. Harris_ does not bar the application of the doctrine of ancillary jurisdiction to a class action where the named class members establish the requisite jurisdictional amount but some of the unnamed class members have not, and application of ancillary jurisdiction is proper in such a case.**

### A. The underlying case support for *Snyder v. Harris*, does not justify the extension of its holding to this case.

*Snyder v. Harris, supra,* held that the claims of named members of a Rule 23 class action suit could not be aggregated to establish the initial jurisdictional amount required to give the federal courts power to hear the suit. The majority opinion below extended that holding to preclude federal jurisdiction of unnamed class members who lacked the jurisdictional amount even though the named class

members had already satisfied the jurisdictional amount necessary to invoke federal power to hear their suit. The holding below was based upon language in *Snyder* which repeated the statement in four earlier Supreme Court cases involving joinder of claims to the effect that:

> "(W)hen two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount . . ." *Snyder v. Harris*, 394 U. S. 332, 336, citing *Troy Bank v. Whitehead and Company*, 222 U. S. 39, 40 (1911).

Four earlier cases, including *Troy Bank v. Whitehead and Company*, were cited by *Snyder* to support this principle of non-aggregation. They were *Oliver v. Alexander*, 6 Pet. 143 (1832); *Troy Bank v. Whitehead and Company*, 222 U. S. 39 (1911); *Pinel v. Pinel*, 240 U. S. 594 (1916); *Clark v. Paul Gray, Inc.*, 306 U. S. 583 (1939). A review of these four decisions fails to reveal any well-reasoned analysis indicating that extension of the non-aggregation rule is required by any constitutional provisions or acts of Congress so as to preclude the application of ancillary jurisdiction to invoke jurisdiction in this case.

*Oliver v. Alexander, supra*, involved an appeal to the Supreme Court brought by an assignee of the assets of a ship owner challenging the separate district court decrees resulting from the claims of seamen against the assets of the ship owner for wages. None of the separate awards exceeded nine hundred dollars, and, thus, the court dismissed the appeals since appellate jurisdiction in the Supreme Court then required a claim where the amount in controversy exceeded two thousand dollars. The court refused to aggregate the claims to establish the requisite amount. It based its decision against aggregation on the separate and distinct nature of the seamen's claims as evi-

denced by separate and distinct decrees in each individual case, noting, that on appeal, each claim would have to be analyzed,

> ". . . as a several and distinct contract with each seaman. Each is to stand or fall by the merits of his own claim and is unaffected by those of his co-libelants. The defense which is good against one seaman may be wholly inapplicable to the other. One may have been paid; another may not have performed a service; and another may have forfeited, in whole or in part, his claim to wages." *Oliver v. Alexander*, 6 Pet. 143, 146.

The court then dismissed the appeals stating:

> ". . . the present appeal must be dismissed; *no one* of the decrees in the circuit court involving a matter in dispute sufficient in value to justify the exercise of the appellate authority of this court." *Oliver v. Alexander*, 6 Pet. 143, 150 (Emphasis added).

No mention was made of the situation presented in this case or what the rule should be in a case where one of the claims met the jurisdictional amount.

It is interesting to note, that this case was tried before the Supreme Court in two parts. The initial segment of the case was reported as *Sheppard v. Taylor*, 5 Pet. 675 (1831). There, the court took jurisdiction of the appeal from the case, brought by the seamen jointly under a specialized rule of admiralty law, in order to decide the common question of law involved, namely, whether the funds in the hands of the assignees were liable to the claims of the seamen. Only one of the original libels before the court at that time was in excess of the two thousand dollar jurisdictional amount for appeal. Apparently, the other fifty-seven claims were in general terms and made no reference to a dollar amount. *Oliver v. Alexander*, 6 Pet. 144, 149. The court made no independent inquiry as to the amount

of the other fifty-seven claims, although this court has felt such inquiry to be a duty in cases where there was doubt as to satisfaction of the requisite jurisdictional amount. *Clark v. Paul Gray, Inc., supra.* It proceeded to rule on the common question of law and issued a decree ordering the lower court to submit the individual claims to commissioners and file separate decrees as to each claim based upon the commissioners' findings. Thus, based upon its factual situation, this initial segment of the case is supporting authority for the application of the ancillary jurisdiction doctrine to cases involving common questions of law or fact such as Rule 23 (b) (3) class actions when one, but not all, of the claims has satisfied the jurisdictional amount.

*Troy Bank v. Whitehead, supra,* never analyzed or ruled upon the problem of aggregation of individual claims, since it found the claim therein presented to be joint rather than separate. The sentence containing the dictum quoted in the *Snyder* opinion, *supra,* reads in its entirety as follows:

> "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; *but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.*" 222 U. S. 39, 40 (Emphasis added).

This holding is based upon earlier cases dealing with Supreme Court consideration of whether or not the requisite jurisdictional amount for appellate jurisdiction had been met. See cases cited *Troy Bank v. Whitehead,* 222 U. S. 39, at page 40. These cases are basically creditors' rights suits argued together in the district court for purposes of economy. The prerequisite jurisdictional amount

being then smaller in the district court than the amount necessary for appellate jurisdiction in the U. S. Supreme Court, the jurisdictional amount was questioned as a separate issue in the appellate stage. The court's analysis in these cases follows the same pattern as in *Oliver v. Alexander, supra,* noting the separate and distinct nature of each claim and the problems inherent in analyzing the independent proof necessary to establish each separate claim. In none of these separate and distinct issue cases is there any analysis of the effect on jurisdiction where the common questions of law or fact prevail over the individual issues. Based upon the court's emphasis on the separate and distinct issues presented, it would appear that they must have prevailed over any common issues. Therefore, the earlier separate and distinct claim cases forming the basis for *Troy Bank v. Whitehead, supra,* are not appropriate authority for the situation found in class actions under the present Rule 23 (b) (3).

Today, a Rule 23 (b)(3) class action is more similar to a single right or common and undivided interest situation due to its requirement that "questions of law or fact common to members of the class predominate over any questions affecting only individual members . . ." Justice Fortas recognized this in his dissent in *Snyder v. Harris, supra,* noting that the "painstaking demands of Rule 23" require an initial decision by the district court "that the nominally separate and legally several claims of individuals may be so much alike that they can be tried all at once as if there were just *one claim* . . ." *Snyder v. Harris,* 394 U. S. 332, 357 (Emphasis added). Applying this concept, *Troy Bank v. Whitehead and Company, supra,* would support jurisdiction in this case.

*Pinel v. Pinel, supra,* provided no new independent analysis of the early non-aggregation rule. The holding is based upon the "settled rule" citing the dictum of *Troy Bank v. Whitehead* quoted in the *Snyder* opinion. *Pinel* is particularly inapplicable to this case, since no one plaintiff in *Pinel* had the requisite jurisdictional amount.

*Clark v. Paul Gray, Inc., supra,* again provides no independent analysis of the non-aggregation rule. It merely refers to the same dictum of *Troy Bank v. Whitehead* as restated in *Pinel v. Pinel* and adopts it without further reasoning. Such an opinion lacking any independent analysis should not be an "insurmountable barrier" to consideration of the evolving concept of ancillary jurisdiction.

As the foregoing analysis indicates, the case support for the majority opinion in *Snyder v. Harris, supra,* does not contain any well-reasoned construction of constitutional provisions or acts of Congress restricting jurisdiction in cases where common questions of law or fact prevail and one or more of the parties has a proper basis for invoking federal jurisdiction.

**B. The underlying policy considerations of *Snyder v. Harris*, will not be thwarted by application of the doctrine of ancillary jurisdiction to a Rule 23 (b)(3) class action where the named class members possess the requisite jurisdictional amount.**

The major policy consideration underlying the majority opinion in *Snyder v. Harris, supra,* was that a change in the non-aggregation rule would have to be applied to the liberal joinder provisions of Rule 20 and the joinder of claims provision of Rule 18 thus opening a Pandora's box by allowing federal jurisdiction over any claims "of any parties that for any single reason happen to be brought together in a single action". *Snyder v. Harris,* 394 U. S.

332, 340. This does not follow in a case where the representative plaintiffs meet the jurisdictional amount. In *Snyder*, all parties including the representative plaintiffs had minimal claims, each under ten thousand dollars. If those parties had been permitted to aggregate, the result would have been the bringing of a federal court action which could not otherwise have been brought. But as already indicated, this action has been brought and will proceed in federal court in any event, and it will be consistent with the purposes of promoting judicial economy to adjudicate all the claims in one lawsuit.

Nor does it follow that the limited ancillary jurisdiction rule urged by the plaintiffs in this class action must be applied to the joinder provisions of Rules 18 and 20.

In its most recent treatment of a particularized form of ancillary jurisdiction, pendent jurisdiction, this court stated that:

> "Joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of America v. Gibbs*, 383 U. S. 715, 724 (1966).

The court noted that this doctrine had its own built in remedy to prevent the type of abuses feared in *Snyder* by virtue of the discretionary nature of the power of ancillary jurisdiction.

> "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion not of plaintiff's right." *United Mine Workers v. Gibbs*, 383 U. S. 715, 726.

Rule 23 (b)(3) mandates the application of jurisdictional discretion by requiring that the court find "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy". In making

such a finding the court must consider "the desirability or undesirability of concentrating the litigation of the claims in the particular forum". The application of the general discretionary principles of ancillary jurisdiction noted in *United Mine Workers v. Gibbs, supra,* coupled with the mandated exercise of discretion in Rule 23 (b)(3) guarantees the federal courts sufficient power to cope with and deny jurisdiction over claims "of any parties that for any reason happen to be brought together in a single action".

Since this court's decision in *United Mine Workers v. Gibbs, supra,* the lower federal courts have applied the ancillary jurisdiction concept to exercise jurisdiction over parties having claims which do not meet the jurisdictional amount requirement where one or more of the plaintiffs having claims stemming from a common nucleus of law or fact do satisfy the requirement. For example, in *Hatridge v. Aetna Casualty and Surety Company,* 415 F. 2d 809 (C. A. 8th, 1969) the court allowed the plaintiff wife to append a claim of less than the jurisdictional minimum for loss of consortium to her husband's claim for personal injuries. In so doing, the court referred to the leading role taken by the Third Circuit in the application of the ancillary and pendent jurisdiction concepts, and said,

> ". . . we find ourselves in sympathy with the 3rd Circuit approach for appropriate cases. It makes good sense; it avoids forum shopping and multiple actions, it tends to reduce costs for litigants; and it avoids the waste of already heavily burdened judicial time . . ." *Hatridge v. Aetna Casualty and Surety Company,* 415 F. 2d 809, 817.

In *Johns-Manville Sales Corp. v. Chicago Title & Trust Co.,* 261 F. Supp. 905 (D. C. Ill. 1966) the court upheld the joinder of a co-plaintiff asserting a claim for less than the jurisdictional minimum. It said,

"Neither the federal jurisdictional statutes nor the prohibition against aggregating of amounts claimed is vitiated by permitting a properly joined co-plaintiff to remain in federal court. Jurisdiction in such situations does not come from the joinder rules but rather, as in the theory of ancillary jurisdiction cases, from the fact that a plaintiff is without the necessity of joinder, properly before the court. The jurisdictional requirements having been met by one plaintiff, those properly joined should be permitted to litigate their claims in the same action." *Johns-Manville Sales Corp. v. Chicago Title & Trust Co.* 261 F. Supp. 905, 907.

See also *General Research, Inc. v. American Employers' Ins. Co.*, 289 F. Supp. 735 (D. C. Mich., 1968); (Claims for more than the jurisdictional amount asserted against four insurers, with ancillary jurisdiction assumed over three additional defendants); *Lucas v. Seagrave Corp.*, 277 F. Supp. 388 (D. C. Minn., 1967) (Plaintiff asserting claim for less than jurisdictional amount); *F. C. Stiles Contracting Co. v. Home Insurance Co.*, 431 F. 2d 917 (C. A. 6th, 1970) (Claim against insurer for $12,000.00, pendent jurisdiction assumed over claims of less than the jurisdictional amount against co-insurers); *Jacobson v. Atlantic City Hospital*, 392 F. 2d 149 (C. A. 3d, 1968) (Malpractice action against a hospital and two physicians; the required jurisdictional amount existed as to the physicians, and the court assumed ancillary jurisdiction over the claim against the hospital); *Wilson v. American Chain and Cable Co.*, 364 F. 2d 558 (C. A. 3d, 1966) noted 1967, 16 Cath. U. L. Rev. 336, 66 Mich. L. Rev. 373; *Wiggs v. City of Tullahoma*, 261 F. Supp. 821 (D. C. Tenn., 1966); *Astor Honor, Inc. v. Grosset and Dunlap, Inc.*, 441 F. 2d 627 (C. A. 2d, 1971); *Leathers Best, Inc. v. S. S. Mormaclynx*, 451 F. 2d 800 (C. A. 2d, 1971).

From the foregoing, it is apparent that since *Gibbs* the federal courts have been applying the concept of ancillary

jurisdiction in joinder matters to claims not meeting the jurisdictional amount. In order to continue the present trend of avoiding a multiplicity of litigation through the expansion of the ancillary jurisdiction concept, the application of ancillary jurisdiction on a discretionary basis is equally appropriate in Rule 23 (b)(3) actions, such as the plaintiffs' case here.

## POINT III

**A Rule 23 (b)(3) class action is analogous to intervention as of right and no independent basis of jurisdiction should be required of the unnamed class members.**

The lower court's extension of *Snyder v. Harris, supra,* to preclude jurisdiction in this case was based upon its conviction that the analogy of Rule 23 (b)(3) class actions "to joinder cases remains valid".

However, today the Rule 23 (b)(3) class action is more properly analogous to intervention as of right under Rule 24 (a)(2) of the Federal Rules of Civil Procedure.

Rule 24 (a)(2) provides for the intervention as of right,

> "when the applicant claims an interest relating to the property or transaction which is the subject matter of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties". F. R. Civ. P. 24 (a)(2).

The words "as a practical matter" were added to the rule in 1966. Prior to this amendment, it had been the rule of this court that a person seeking intervention as of right would have to be in a position where he would be legally bound under principles of *res judicata. Sam Fox Publishing Corp. v. U. S.*, 366 U. S. 683 (1961).

Since 1966, all unnamed parties in a Rule 23 (b)(3) class action are bound by the court's judgment unless they specifically request exclusion from the class; the class member, therefore, has been placed in the same position as a pre-1966 intervenor of right under Rule 24 (a)(2); he is bound by the judgment of the court.

Moreover, the class member is in the same position as a post-1966 intervenor as of right under Rule 24 (a)(2). If, as in this case, the class action is not allowed to proceed but a multiplicity of federal actions will be brought in any event by persons possessing the requisite jurisdictional amount, then those claimants would be intervenors as of right under Rule 24 (a)(2) since their ability as a practical matter to protect their interests would be impaired by the case in chief proceeding to judgment. For example, if a claimant with a claim in excess of ten thousand dollars brought his claim in federal court after an adverse decision in the case of the original named parties, it is probable that the court would rely on the doctrine of *stare decisis* as to common issues of law. The possibility of the application of *stare decisis* has been recognized as a sufficient practical impairment of a claimant's interest to justify his being treated as an intervenor of right. *Atlantis Development Corporation v. United States*, 379 F. 2d 818 (C. A. 5, 1967).

Other practical matter impairments would also exist. Many state court judges might be unwilling to rule independently on a question before them that had already been decided by a federal court. Further, the publicity of the trial might have the effect of swaying a jury's opinion on an issue decided in the original action in the federal court by the named parties.

A Rule 23 (b)(3) class member, therefore, is in the same position as an intervenor as of right, whether under the pre or post 1966 version of Rule 24 (a)(2). The jurisdictional principles applicable to him as intervenor should, therefore, likewise apply to him if he is a class member. The great weight of authority is that if a claimant has intervention as of right, no independent basis of jurisdiction over that intervenor is required. *Formulabs, Inc. v. Hartley Pen Co.*, 318 F. 2d 485 (C. A. 9, 1963) Cert. denied, 375 U. S. 945; *Kozak v. Wells*, 278 F. 2d 104 (C. A. 8th, 1960) 84 A. L. R. 2d 1400; *Black v. Texas Empire Association*, 326 F. 2d 603 (C. A. 10th, 1964).

## POINT IV

**Application of the doctrine of ancillary jurisdiction to this case will promote the proper utilization of Rule 23 (b) (3) class actions.**

At the time *Snyder v. Harris, supra,* was decided, the words, "environmental protection" had not acquired the important connotation which they have today.[1] Since that time, however, the concept of environmental protection has rapidly grown. This court has recently adopted a favorable attitude towards expanding federal jurisdiction to aid environmental protection. In *Illinois v. City of Milwaukee,*

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[1] Public interest in this issue, and in particular as it relates to class actions, is illustrated in many ways; one noteworthy item is H. R. 4900 introduced into the House of Representatives by Congressman Alphonso Bell of California; this bill reads:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that for the purpose of determining jurisdiction of a class action suit brought in the federal courts of the United States according to the Federal Rules of Civil Procedure, the aggregate claims for or against the entire class shall be regarded as the amount in controversy."

This bill is presently pending.

406 U. S. 91 (1972) this court declared that the federal courts had power to develop a federal common law to be applied to pollution cases involving navigable or interstate waters. It further broadened the interpretation of "laws" under 28 U. S. C. 1331 to allow jurisdiction over cases involving this federal common law rather than just statute law.

As in this case, it is unfortunate that this positive approach has been hampered by improper extension of dicta in *Snyder*. Such improper application has caused one commentator to state:

> "Decisions in which *Snyder* is applied to thwart the vindication of environmental claims enable the pollutor to avoid the substantial costs of control attendant to litigation by class action. Cognizant of the fact that no individual member of the public can afford the expensive litigation costs, the pollutor is free to proceed upon a course which results in environmental destruction. Since the expensive costs of litigation to the individual will probably far exceed the minimal damages that a successful individual plaintiff can obtain, it is likely that the pollutor plaintiff will be subjected to only infrequent litigation. Unless there is some mechanism for circumventing the *Snyder* decision, its prohibition against aggregation of claims under Revised Rule 23 'may prove one of the most serious obstacles to environmental class actions for damages . . .'" *Strausberg, Class Actions and Jurisdictional Amount: Access to a Federal Forum—A Post Snyder v. Harris Analysis,* 22 American University Law Review 79, 90 (Fall 1972).

As has already been indicated, the application of the doctrine of ancillary jurisdiction to a class action is consistent with the purposes of *Snyder v. Harris, supra.* If ancillary jurisdiction is properly applied to situations as in this case, it will not be necessary to circumvent *Snyder*

*v. Harris, supra.* It will further the purpose of a class suit by providing a procedure to protect large segments of the public from the wrongdoings of the pollutor, and, promote judicial economy.

## Conclusion

The United States Supreme Court should reverse the decision of the Second Circuit Court of Appeals and remand the action to the United States District Court for the District of Vermont under an order giving that court jurisdiction over the unnamed persons in the alleged class.

Respectfully submitted,

LANGROCK AND SPERRY,

By s/ PETER F. LANGROCK,
*Attorneys for Petitioners.*

**Certificate of Service Under Rule 33**

SUPREME COURT OF THE UNITED STATES

**October Term 1972**

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**No. 72-888**

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H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

*Petitioners,*

v.

INTERNATIONAL PAPER COMPANY.

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I, Peter F. Langrock, Esq., a member of the firm of Langrock and Sperry, Drawer 351, Middlebury, Vermont, 05753, attorney for the plaintiffs in the above entitled cause and the petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 5th day of April 1973, I served copies of the foregoing Brief on the International Paper Company, by mailing three copies thereof, in a duly addressed envelope with first class postage prepaid, to the attorneys of record for said defendant, Richard E. Nolan, Esq., a member of the firm of Davis, Polk and Wardwell, 1 Chase Manhattan Plaza, New York, New York, 10005, and Henry Black, Esq., a member of the firm of Black and Plante, Municipal Building, White River Junction, Vermont, 05001.

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